CONLEY P. SMITH OIL PRODUCER

IBLA 87-400 Decided July 27, 1989

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, upholding issuance of Notices of Incidents of Noncompliance Nos. WY-061-87-417 and WY-061-87-422 (lease No. W-76330).

Affirmed as modified.

1. Oil and Gas Leases: Civil Assessments and Penalties--
Oil and Gas Leases: Incidents of Noncompliance

Under 43 CFR 3162.5-1(c) and NTL 2-B, BLM may properly require the removal of all fluids discharged into a surface pit and may impose a civil assessment for failure to timely comply with an order to do so.

APPEARANCES: Robert P. Vernon, Operations Manager, for Conley P. Smith Oil Producer, Denver, Colorado; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Conley P. Smith Oil Producer (Conley) has appealed a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated March 11, 1987, finding that issuance of Notices of Incidents of Noncompliance (INC) Nos. WY-061-87-417 and WY-061-87-422 was technically and procedurally correct.

INC No. WY-061-87-417 was issued January 16, 1987, by Inspector Rafael Navarrette of the Buffalo Resource Area Office, BLM, based on an inspection of the site of the KD Federal #33-8 well on oil and gas lease W-76330 in Campbell County, Wyoming, conducted by him on the previous day. The INC cited appellant for violation of NTL-2B (40 FR 57814 (Dec. 12, 1975)) due to oil found in the emergency pit. Photographs included in the case file show the pit to be an unlined earthen pit. The INC required that the operator "[m]ust remove all fluids from the emergency pit and report all use [of] emergency pits as soon as possible." At the same time Navarrette issued two other INC's citing appellant for violations of 43 CFR 3162.7-4 due to defects found on tank valves. All three violations were classified as moderate.

Inspector Navarrette reinspected the site on January 26, 1987, and found that the defects in the valves had been corrected but that oil remained in the pit. Based on this finding, he issued INC No. WY-061-87-422 citing appellant for failure to comply with the written order contained in INC No. WY-061-87-417 within the specified time. Pursuant to 43 CFR 3163.3(a) (1986), the accompanying cover letter imposed an assessment of $250 for failure to comply with the prior order.

Conley received INC No. WY-061-87-422 on February 6, 1987. By letter dated February 23, 1987, Robert P. Vernon, Conley's Operations Manager, filed an appeal of the citation and penalty. 1/ The letter states that the heater treater malfunctioned on December 12, 1986, dumping 15-20 barrels of oil into the emergency pit and that, upon discovery of the malfunction, the unit was repaired and arrangements made to have the pit emptied. 2/ A copy of the work ticket accompanying the letter shows that 17.5 barrels of oil were removed from the pit on December 13, 1986. Conley's letter also states that the original INC was never received. It points out that, upon receipt of the second INC on February 6, Conley notified its field gauger, who had the pit emptied the next day. A February 28, 1987, letter from the company which performed the work states that approximately two barrels of oil and three barrels of water and ice were removed from the pit. Based on the small amount of fluid removed from the pit in February, the lack of receipt of the original INC, and the prompt removal of the liquid from the pit in December, Conley requested that the INC be "reversed."

In subsequent telephone conversations between Conley and BLM, Conley chose to have the letter treated as a request for technical and procedural review by the state director. See 43 CFR 3165.3. The decision which is before us on appeal is the result of that review.

The state director's decision first addresses Conley's assertion that he did not receive the original INC. The decision notes that the signature on the return receipt card for the original INC is similar to that on the return receipt card for the notice of failure to comply with that INC. Appellant's statement of reasons acknowledges that the signature is that of Conley's secretary and explains that the problem arose because the postal carrier would deliver mail in a bundle with return receipt cards separated and placed on top. Appellant states that it is not making the matter of

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1/ The regulation in effect at the time required that a request for technical and procedural review be received in the state office within 10 working days of receipt of an INC. 43 CFR 3165.3 (1986). BLM's decision states that, pursuant to the authority of 43 CFR 1821.2-2(g) (1986), it was accepting the request as timely filed due to the unusual circumstances regarding the receipt of the INC. The regulations now allow 20 business days to file a request for review by the state director. 43 CFR 3165.3. See San Juan Citizens Alliance, 104 IBLA 288 (1988).

2/ Conley's letter actually states that the spill occurred on Jan. 12, 1987. Because the invoice and shipping order submitted with the letter are clearly dated December 1986, we presume the use of the incorrect month was inadvertent.

receipt of the INC a basis of its appeal, but that it "does explain our reason for not immediately responding to the citation of January 20 [sic], 1987 (a copy of which we do not have in our files)."

The second matter addressed by BLM's decision is Conley's question "whether the amount of fluid in the emergency pit constituted a violation." The decision finds that "measurable and recoverable quantities of oil were apparently left in the pit" when oil was removed in December. The decision states: "It is reasonable to presume that a little oil would soak into the ground and resurface onto the melted snow. However, the volume of oil that would resurface would be much less than the two barrels recovered on February 7." For this reason the decision concludes "that there was a violation of NTL-2B in that the emergency pit was not properly emptied after the pit was used." Accordingly, BLM determined that the "Buffalo Resource Area's enforcement actions were technically and procedurally correct."

On appeal Conley contends that the emergency pit was properly emptied on December 13, 1986. Accompanying the statement of reasons is a statement from Mike Morrison, Conley's field gauger. It states that when he discovered the accident he telephoned for a vacuum truck and waited for it.
His statement continues:

> We recovered <u>all</u> the oil & put it back in the tank. A vac truck can get almost every bit of fluid, since we didn't want dirt in the oil we left a few gallons in a puddle but certainly less than one barrel. However, the dirt banks were saturated and in the next 30 days they gave up some oil to the bottom of the pit. [Emphasis in original.]

Appellant also states that, "in order to totally clean the pit and have absolutely no liquid remaining," it hired a company, at a cost of $624.50, "to clean out the oily dirt and put fresh dirt in the pit with a front-end loader and backhoe." Appellant contends that BLM's requirement "to make an emergency pit totally liquid free was above and beyond the federal requirement concerning temporary use of an emergency pit, requiring that all liquids in the pit be emptied and disposed of within 48 hours following its use * * *." Appellant further asserts:

> We feel that the approximate two barrels of oil was washed into the pit by the melted snow from the oil that saturated the dirt walls of the pit on December 12, 1986. The continuous snow and melting of snow saturating the dirt in the pit created an imbibition that displaced the oil from the saturated dirt of the pit and ran into the pit with the melted snow water.

This situation, appellant states, "is normal during the winter months in the Wyoming area." Appellant states that "[a]ll efforts were made to abide by the Federal Regulations on December 12 and 13" and that "extraordinary efforts * * * were made to totally clean the pit and reline it with fresh
dirt to satisfy the Bureau of Land Management and not have the same situation re-occur." Again appellant raises the question whether "the small amount of fluid * * * ever constituted a violation."

In its response, submitted through the Office of the Regional Solicitor, BLM disagrees with appellant's contention that only a small amount of oil had been left in the pit and that the remainder came from the saturated sides of the pit. BLM states:

> In a pit the size of the subject emergency pit, it is reasonable to expect several gallons to soak into the dirt. It is also reasonable to expect water to drive a little oil (maybe 2 to 10 gallons) back out of the dirt. However, a barrel of oil is 42 gallons. * * * Since the amount of oil finally recovered was on the order of 80 gallons, we can only reasonably conclude that recoverable, measurable quantities of oil were left in the pit when the initial problem was partially corrected. [Emphasis in original.]

BLM also states that it never instructed appellant to clean the oily dirt from the pit and replace it with clean soil, but that its policy is that liquids must be removed from a pit.

BLM cites 43 CFR 3162.7-1(b) and NTL-2B as "the basis for the reasonable interpretation that the requirement is to remove all recoverable, measurable oil from the emergency pit." In this regard, BLM argues that it expects "some dirt to be recovered with the oil and subsequently handled in regular treatment" because recovering only oil which does not require treatment "would waste recoverable, treatable oil." For this reason it contends that "the practice of not recovering the measurable, treatable oil reasonably constitutes a violation of the regulations and NTL-2B."

NTL-2B is titled "Disposal of Produced Water" and requires an operator to construct a pit to prevent water produced by a well from contaminating surface and ground waters. Cf. A.G. Andrikopoulos Oil & Gas Properties, 108 IBLA 369 (1989). As a secondary matter, NTL-2B also allows use of the pits in emergencies and for other temporary purposes, but requires that it be "emptied." The relevant portion of NTL-2B, "VI. Temporary use of surface pits," allows retention of unlined pits for use as temporary containment pits in an emergency but states that "the pit shall be emptied and the liquids disposed of in an approved manner within 48 hours following its use, unless such time is extended by the District Engineer." 40 FR 57815 (Dec. 12, 1975).

43 CFR 3162.7-1(b) provides that, without prior approval, "no oil should go to a pit except in an emergency" and that the "occurrence must be reported to the authorized officer and the oil promptly recovered in accordance with applicable orders and notices." 3/ The requirement that oil be "promptly recovered" originates with revisions to the oil and gas lease operating regulations initiated by the Geological Survey. 30 CFR

3/ 43 CFR 3162.7-1(b) also requires that oil that accumulates in a pit "either be (1) recirculated through the regular treating system and returned to the stock tanks for sale, or (2) pumped into a stock tank without treatment and measured for sale in the same manner as from any sales tank."

221.36, 47 FR 47758, 47771 (Oct. 27, 1982). The prefatory comments to this rule when proposed indicates that its purpose was to insure that the oil was recovered and sold: "Provisions pertaining to run tickets, seals, and other factors associated with the handling and sale of crude oil have been strengthened and clarified to meet increased emphasis on preventing oil loss and assuring proper handling and measurement." 46 FR 56565 (Nov. 17, 1981). The same purpose appears in 43 CFR 3162.7-1(a). That subsection imposes a duty on lessees to "put into marketable condition, if economically feasible, all oil * * * produced from the leased land."

[1] However, in our view, this is not the most appropriate regula-tion under the circumstances. When oil or other substances are spilled or leaked, the lessee is to exercise "due diligence in taking necessary measures, subject to approval by the authorized officer, to control and remove pollutants." 43 CFR 3162.5-1(c). How much of the fluids that are required to be removed from the pit under this regulation must be treated and put into marketable condition in accordance with 43 CFR 3162.7-1 is another matter, however, and depends on what is economically feasible as distinct from what is environmentally necessary. In this case, in BLM's view, the discharge of oil into the pit necessitated removing all fluids but not removing oil-soaked soil. We find no difficulty with BLM's position as a matter of what is required under 43 CFR 3162.5-1(c) in this case. Cf. Mapco Oil & Gas Co., 94 IBLA 158 (1986); Willard Pease Oil & Gas Co., 89 IBLA 236 (1985).

It is agreed by the parties that the well produces no water and that only oil was spilled into the pit on December 12, 1986. The copies of the two work orders submitted by appellant show that 19.5 barrels of oil have been removed from the pit. The amount actually spilled was probably slightly more because some oil remained in the soil after the pit was pumped the second time. Assuming that the spill was 20 barrels of oil, the spill consisted of 112.29 cubic feet of liquid. Approximately two barrels of oil were recovered from the pit on February 7. Two barrels is 84 gallons, which is 19,404 cubic inches of liquid. This amount would cover an area of 134.75 square feet at a depth of 1 inch.

The record does not indicate the size of the pit or the slope of its sides and we are unable to reliably estimate its dimensions from the photographs in the case file. For this reason, we also cannot tell how full the pit became on December 12. 4/ For the same reason we cannot estimate the amount or depth of oil which may have been left on the bottom of the pit on December 13. However, when the volume of oil spilled is viewed in relation to volume of oil removed from the pit on February 7, it becomes apparent that either an improbably large amount of oil must have been absorbed by each square foot of pit surface covered by the spill, or a considerable amount of oil must have remained in the bottom of the pit after it was cleaned on December 13. For example, in a pit of sufficient size so that

4/ The photographs show a portion of the sides of the pit to be oil stained. They, of course, cannot show that these stains were caused by the oil spilled on Dec. 12 rather than from use of the pit on other occasions.

the depth of the oil spilled was approximately 1 foot (12 by 9.5 feet), almost nine-tenths of an inch of oil would have to be uniformly absorbed into the surface or else would remain in the pit. In a pit with a smaller base (6 by 4 feet) so that the oil spilled reached a depth of somewhat over 4.5 feet, even allowing for the sloping sides to increase the surface area, about seven-tenths of an inch of oil would need to be absorbed or the equivalent would remain in the pit.

Absent information in the case file showing that such an amount of oil could have been absorbed into the soil, we conclude that BLM correctly determined in its decision that not all of the oil recovered on February 7 came from oil-saturated soil. In particular, we find that the quantity of oil recovered on February 7 shows that some amount of oil was left in the pit when it was emptied on December 13. This conclusion is confirmed by the statement of appellant's field gauger that "a few gallons" of oil were left in the pit because "we didn't want dirt in the oil," and appellant has not shown by a preponderance of evidence that he removed all fluids from the pit in December. See Mapco Oil & Gas Co., supra at 161.

Finally, we address two other points raised by appellant. Conley's petition for technical and procedural review complained of the "severe penalty points (41)" attached to the violation. Nothing in the record before us indicates that this number was assessed. Rather, the original INC valued the violation at two points. BLM did not mention the matter in its decision. The reason appears to be that in the interim the system of penalty points was dropped from the regulations. See 51 FR 3882, 3886 (Jan. 30, 1986) (proposed rules); 52 FR 5384 (Feb. 20, 1987) (final rules).

Appellant has also complained about being required to clean oily dirt from the pit in order to make it liquid free. BLM states that it never ordered or implied that the oily dirt was to be removed. Appellant's belief that it was required to remove the oily dirt appears to have originated with the statement in INC No. WY-061-87-422 that Conley was to "remove all fluids from the emergency pit." Because Conley understood that it was being cited for oil which had come from saturated soil, it concluded that, in order to avoid future citations, it had to remove all oily soil. In fact, as BLM indicates, such efforts were not required in this case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Wyoming State Office is affirmed as modified by our analysis of NTL-2B, 43 CFR 3162.7-1, and 43 CFR 3162.5-1(c).

Will A. Irwin
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge